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Muhammad Faizal bin Dzulkifli v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — APPEAL NO C-05(M)-326–12 OF 2015
TENGKU MAIMUN, ABANG ISKANDAR AND AHMADI ASNAWI JJCA
9 JANUARY 2017

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Criminal Law — Murder — Appeal against conviction and sentence — Appellant charged for murder punishable under s 302 of the Penal Code — Whether injury suffered by deceased caused by appellant — Whether appellant had intention to caused death of deceased — Whether learned judicial commissioner failed to appreciate appellant's defence — Penal Code ss 300 & 302

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The appellant was charged with the offence of murder punishable under s 302 of the Penal Code ('the Code'). The evidence led by the prosecution through its witnesses had shown that the appellant was seen hitting the deceased on his head many times at various places that eventually led to the deceased collapsing prior to his death in the hospital. At the defence stage, the learned judicial commissioner ('the learned JC') found that the appellant had failed to raise a reasonable doubt against the prosecution's case and found him guilty of the charge and sentenced him to death. Dissatisfied with the decision, the appellant filed the present appeal. The appellant submitted that, based on the medical report ('P21'), the deceased had fallen down and the injury could have been caused by a fall suffered by the deceased. Further, although the appellant had admitted that he had hit the deceased on the head, it was his case as well that one Mohammad Firdous ('SP10') had also hit the victim on the head. The appellant had also raised issues on the lack of intention on his part to cause the death of the deceased and the alleged failure on the part of the learned JC to sufficiently appreciate the defence of the appellant.

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Held, dismissing the appeal and affirming the conviction and sentence by the learned JC:

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(1) The contents of the 'Sejarah' in the P21 were based on what was told to the attending doctor by persons who had brought the victim into the hospital. It was never established who had told those facts to the doctor. At the highest, it was hearsay. Further, it was not put to SP10 that he had indeed hit the deceased on the head, thus the submission remained a mere assertion with no probative value. With regards to the contention that the injury could have been caused by a fall, it was not stated by the appellant which part of the deceased head had hit the ground during the

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fall, whilst the evidence of the prosecution's witness was clear that the injury suffered by the deceased was on the left side of his head and it was a serious head injury. Based on totality of the evidence, there was no merits in the complaint raised by the appellant in relation to P21 (see paras 12–14).

(2) Based on the evidence, the appellant was seen hitting the deceased on his head many times at various places on the fateful day. It was clear that the appellant had intended the injuries which were inflicted on the deceased's head which, objectively, was a critical part of a human person's anatomy. Further, there was evidence of the medical expert who testified that such injury was sufficient, in the ordinary course of nature to cause death to the deceased. There was also no intervening cause that could have caused the death of the deceased. Benevolent conduct of the appellant could not change the finding of guilt that had been concluded. At the highest, it may go towards mitigation, if at all. The court therefore was in agreement with the learned JC that a charge for murder under limb (c) to s 300 of the Code had been made out against the appellant (see paras 24–25, 27 & 31).

(3) The learned JC had noticed that the material factual circumstance which the appellant had advocated during the course of his defence was never put to the relevant witnesses for the prosecution. In the circumstances, it was not wrong for the learned JC to regard the appellant's defence as an afterthought defence. The learned JC had scrutinised the entire evidence before him and subjected them to an objective and critical assessment; hence, he had not committed any error of an appealable nature, in the course of his appreciation of the appellant's defence. The learned JC had correctly dealt with the issues raised and to have concluded that the appellant had not raised any reasonable doubt in the prosecution's case. The prosecution had proven its case beyond reasonable doubt (see paras 35–37).

[Bahasa Malaysia summary

Perayu dituduh dengan kesalahan membunuh yang boleh dihukum di bawah s 302 Kanun Keseksaan ('KK'). Keterangan yang dibawa oleh pendakwaan melalui saksinya menunjukkan bahawa perayu telah dilihat memukul si mati di kepalanya berkali-kali di pelbagai tempat yang akhirnya menyebabkan si mati jatuh sebelum kematiannya di hospital. Di peringkat pembelaan, pesuruhjaya kehakiman bijaksana ('PK') mendapati perayu gagal untuk membangkitkan keraguan munasabah terhadap kes pendakwaan dan mendapati dia bersalah atas tuduhan dan menjatuhkan hukuman mati atasnya. Tidak berpuas hati dengan keputusan itu, perayu memfailkan rayuan ini. Perayu mengemukakan bahawa, berdasarkan laporan perubatan ('P21'), si mati telah terjatuh dan kecederaannya boleh diakibatkan daripada jatuh yang dialami oleh si mati. Selanjutnya, walaupun perayu telah mengakui bahawa dia

telah memukul si mati di kepala, ia adalah kesnya dan juga seorang yang bernama Mohammad Firdous ('SP10') juga telah memukul mangsa di kepala. Perayu juga telah membangkitkan isu kekurangan niat pada pihaknya untuk menyebabkan kematian kepada si mati dan kegagalan yang dikatakan pada pihak PK bijaksana untuk memahami pembelaan perayu.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman oleh PK bijaksana:

(1) Kandungan 'Sejarah' dalam P21 adalah berdasarkan atas apa yang diberitahu kepada doktor bertugas oleh orang yang membawa mangsa ke hospital. Ia tidak pernah dibuktikan siapa yang memberitahu fakta tersebut kepada doktor. Paling tinggi, ia adalah khabar angin. Selanjutnya, ia tidak diletakkan kepada SP10 bahawa dia telah sememangnya memukul si mati di kepala, maka penghujahan kekal satu dakwaan semata-mata tanpa ada nilai sebagai bukti. Berkaitan dengan hujah bahawa kecederaan itu boleh diakibatkan daripada jatuh, ia tidak dinyatakan oleh perayu bahagian mana daripada kepala si mati yang telah mencecah tanah sewaktu jatuh, manakala keterangan pendakwaan adalah jelas bahawa kecederaan yang dialami oleh si mati adalah pada bahagian kiri kepalanya dan ia adalah kecederaan kepala yang serius. Berdasarkan keseluruhan keterangan, tiada merit dalam aduan yang dibangkitkan oleh perayu berkaitan dengan P21 (lihat perenggan 12–14).

(2) Berdasarkan keterangan, perayu dilihat memukul si mati di kepalanya berkali-kali di pelbagai tempat sewaktu hari kejadian. Adalah jelas bahawa perayu berniat atas kecederaan yang dikenakan atas kepala si mati yang mana, secara objektif, adalah bahagian penting dalam anatomi seseorang manusia. Selanjutnya, terdapat keterangan pakar perubatan yang memberi keterangan bahawa kecederaan sebegitu adalah mencukupi, dalam perjalanan semula jadi untuk menyebabkan kematian kepada si mati. Juga tiada sebab campur tangan yang boleh menyebabkan kematian si mati. Kelakuan baik hati perayu tidak boleh mengubah dapatan bersalah yang telah diputuskan. Paling tinggi, ia mungkin boleh dibawa kepada pengurangan, jika sekali pun. Mahkamah oleh itu bersetuju dengan PK bijaksana bahawa tuduhan untuk membunuh di bawah peruntukan (c) s 300 Kanun telah dibuat terhadap perayu (lihat perenggan 24–25, 27 & 31).

(3) PK bijaksana telah mengenal pasti bahawa fakta keadaan material yang mana telah ditegaskan oleh perayu sewaktu perjalanan pembelaannya tidak pernah diletakkan kepada saksi relevan untuk pendakwaan. Dalam keadaan itu, adalah tidak salah untuk PK bijaksana menganggap pembelaan perayu sebagai pembelaan yang difikirkan kemudian. PK bijaksana telah meneliti keseluruhan keterangan di hadapannya dan

meletakkan mereka kepada penilaian yang objektif dan kritikal, maka dia tidak melakukan apa-apa kesalahan yang bersifat membolehkan rayuan, dalam penilaiannya terhadap pembelaan perayu. PK bijaksana telah dengan betul menangani isu yang dibangkitkan dan telah menyimpulkan bahawa perayu tidak membangkitkan apa-apa keraguan munasabah dalam kes pendakwaan (lihat perenggan 35–37).]

Notes

For a case on appeal against conviction and sentence, see 4(2) *Mallal's Digest* (5th Ed, 2015) para 1736.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Browne v Dunn (1893) 6 R 67, HL (refd)
Faquira v State of Uttar Pradesh AIR 1955 All 321, HC (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
PP v Megat Shahrizat bin Megat Shahrur [2013] 3 MLJ 227; [2011] 5 CLJ 608, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Penal Code ss 300, 300(c), 302
Indian Penal Code [IND] 300

Appeal from: Criminal Trial No 45B-07–03 of 2014 (High Court, Kuantan)

Ahmad Nizam bin Hamid (Mohd Falihin Kamil bin Mohd Sazali with him) (Sazali & Lim) for the appellant.
Nurshafini bt Mustapha (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

THE CHARGE

Bahawa kamu pada 10 Jun 2013 di antara jam lebih kurang 12 tengah malam hingga 1 pagi bertempat di dalam rumah beralamat No 12, Jalan Bahagia 43, Taman Bahagia, di dalam daerah Temerloh, di dalam negeri Pahang telah membunuh Mohamad Borhan bin Md Radzali @ Mohamad Rozali, KPT: 950323-06-5677. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seskyen 302 Kanun Keseksaan.

SALIENT FACTS OF THE CASE

[1] On the 9 June 2013, Mohamad Amirul bin Yaacob ('SP7') together with one Md Hakim and Muhammad Faizal bin Dzulkifli ('the appellant') went to an industrial area in Mentakab to look for Mohamad Borhan bin Md Radzali @ Mohamad Rozali ('the deceased').

[2] All three of them entered into a shop where they found the deceased. The deceased later was pulled out by the appellant to an alley behind the shop. It was the evidence of SP7 that he saw the appellant hit the deceased by hand. The deceased then tried to escape but the appellant managed to catch him. The deceased was brought into a car, driven by and belonging to SP7 to an entertainment club together with SP10 and Md Hakim.

[3] At the club, the appellant pulled the deceased out of the car. SP10 saw the deceased ran away while the appellant chased after him. The appellant had also punched the deceased while chasing him. The deceased later fell down on the road. At that time, the appellant pulled off the deceased's shirt before he took the deceased back to the car. The deceased was seated in between the appellant and Hakim at the back seat of the car. The car was headed to their rented house in Jalan Bahagia, Temerloh. Upon arriving, the deceased and the appellant went to the second floor of the house. At the second floor, the appellant smacked the deceased's head down which caused him to fell and leaned against the wall.

[4] SP7, who was still at the staircase saw the appellant kneed the deceased's head at the left side. About ten to 15 minutes after that, the deceased and the appellant were seen to come down to the first floor and sat side by side at the sofa.

[5] After a while, SP7 saw the appellant kicked the deceased at his neck. The deceased became unconscious. The deceased was brought to Temerloh Hospital before being referred to Kuala Lumpur Hospital on the same day ie 10 June 2013 as no improvement was shown by the deceased, even after the operation to remove the blood clot in his brain.

[6] On 17 June 2013, the deceased suffered respiratory distress which caused him to stop breathing and which led to his death. The post mortem report prepared by Dr Mohd Shah bin Mahmood ('SP8') revealed that the cause of the deceased's death was head injury secondary to blunt trauma.

[7] The appellant was charged as per charge stated above. 13 prosecution witnesses were called to testify in court before the learned judicial commissioner ('the learned JC') decided that a prima facie case had been

established by the prosecution. Thus, the appellant was called to enter his defence.

[8] At the defence stage, only the appellant testified for himself. The learned JC found that the appellant had failed to raise a reasonable doubt against the prosecution's case, therefore found him guilty and convicted him as per charge. The appellant was sentenced to death as it is the only option under s 302 of the Penal Code.

[9] Aggrieved by such decision, the appellant had since appealed against it to the Court of Appeal. We heard the appeal on 6 September 2016 and dismissed his appeal on the same day. These are now our grounds of having so decided.

THE APPEAL

[10] Before us, learned counsel for the appellant submitted on three main issues namely:

(a) on the medical report evidence;

(b) on the intention to cause death; and

(c) no sufficient appreciation of the defence by the learned JC.

[11] We would now deal with the issues raised in turn. First, on the matter that pertained to the medical report. It was submitted by learned counsel for the appellant that in the portion of the medical report marked as P21 namely, the 'Sejarah' or history, it was stated that the deceased had been assaulted after an argument with a group of friends. The mechanism of injury was not clear. He was said to have fallen and was found unconscious after being assaulted (see p 75, record of appeal, Vol 1). It was submitted that the deceased had fallen down, though it was not clear from the report how he had fallen and who had caused him to fall.

[12] Having considered the submissions, we agreed with the learned DPP that the contents of the 'Sejarah' in the P21 were based on what was told to the attending doctor by persons who had brought the victim into the hospital. It was never established who had told those facts to the doctor. At the highest, it was hearsay. But more relevant to the issue at hand would be the substantive contents of the medical report, P21. It was the finding of the doctor who attended the deceased at the material time that he found an injury on the head of the deceased and that it had caused a blood clot in his brain that had required surgery in order to remove the same. The appellant had raised two issues on this injury. One is that although he admitted that he had hit the victim on the head, it was his case as well that Mohammad Firdous bin Nazarudin ('SP10') had also hit the victim on the head (see cross-examination at record of appeal Vol 1,

p 94, Q 30). However, a perusal of the notes of proceedings had shown that it was not put to SP10 that he had indeed hit the deceased on the head at the house. SP10 was not confronted with the specific allegation that he had caused the injury to the head that had caused the blood clot and that had subsequently caused the deceased to die a few days later. In the absence of such specific challenge having been put to SP10, the submission by learned counsel on behalf of the appellant had remained a mere assertion made from the bar table with no probative value at all. If that had been the case for the appellant, then SP10 must be sufficiently confronted as such by the appellant during his cross-examination when he was in the witness stand, so that he could either admit or deny it. A failure to cross-examine a particular witness with regard to a factual circumstance that was material to the appellant's case would invariably lead the court to view the subsequent submission by the appellant to the contrary, as a mere afterthought.

[13] Secondly, it was submitted by learned counsel for the appellant that the said injury could have been caused by a fall suffered by the deceased. It was not stated by the appellant which part of the deceased head had hit the ground during the fall. The evidence of Dr Eng Jian Yang ('SP9') was specific and clear. The injury suffered by the deceased was on the left side of his head. It was a severe head injury (see p 78 lines 14–24, record of appeal, Vol 1). Again, the evidence led on this issue had not borne any credibility on the matter. Indeed, SP8 the pathologist had testified that the injury to the head suffered by the victim could, in the ordinary course of nature cause death, as had happened in this case.

[14] In light of the available evidence as led before the trial court, we could not see any merits in the complaint raised by the appellant in relation to the medical report P21.

[15] As to the second issue on the lack of intention on the part of the appellant to cause the death of the deceased, it was submitted by learned counsel that the fact that the appellant, together with other people, had brought the deceased to the hospital showed that he had no intention to kill the deceased. He had submitted that although there was an intention to cause injury on the deceased person, there was no intention to cause death. His conduct, post the beatings, according to learned counsel, was inconsistent with an intention to cause death. For, it was also submitted before us that the appellant had offered cigarettes and drinks to the deceased after the beatings, thus would negate such intention on the part of the appellant to cause death to the deceased.

[16] In that regard, it is trite law that proof of intention to commit a crime may either be direct or otherwise, namely it may be proved by way of

A circumstantial evidence. It is rare that a serious crime, such as murder, can be proven by way of direct evidence and when that does happen, the accused person must have confessed to having committed the offence. In most other instances, intention to commit the offence, or the mens rea, will have to be discerned from the interplay of the various strands of circumstantial evidence B from which the necessary inferences may or may not be drawn.

[17] Coming back to the factual matrix obtaining in our case in this instant appeal, there were eye-witnesses who saw the appellant beating up the deceased at various places that eventually led to the deceased collapsing prior to him C being sent to the hospital. In fact, in this case, the appellant admitted to having beaten up the deceased but it was his case that he was not the only person who had beaten up the deceased. There were SP7 and SP10 whom the appellant had alleged to have beaten up the deceased as well. But that kind of submission, D with respect would not absolve the appellant completely from the guilt for the death of the deceased. If he was correct and if the evidence led had indeed shown that other persons were also culpable of beating up the deceased that had caused his death, then it would mean that *together* the appellant and those other persons would be guilty of causing the death of the deceased. But the fact that E other persons may have beaten up the deceased, did not exonerate the appellant completely of the commission of the offence. This is quite apart from his allegation that the deceased had fallen down and that his demise could have been caused by the head injury that he could have sustained on account of that fall.

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[18] At this juncture however, we must look back at limb (c) to s 300 of the Penal Code. Section 300(c) of the Penal Code reads: '... if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause G death ...'. From a reading of s 300(c) of the Penal Code, one thing, among others, is clear ie murder under s 300(c) the Penal Code may be committed by a person not only when he *intends* to cause the unlawful killing of another person or persons, but that it may also be committed if he intentionally causes injury to a person which injury, in the ordinary course of nature, would cause H death. Under that limb (c) to s 300 of Penal Code, an intention to kill on the part of an accused person is not a pre-requisite which the prosecution would otherwise have to prove in order to secure a conviction for a murder charge.

I **[19]** That having been said, the prosecution that seeks to rely on this limb (c) to s 300 of the Penal Code, must of necessity lead evidence from a medical doctor to testify in court to the effect that the injury sustained by the deceased is sufficient in the course of nature to cause death to the victim. That test is an objective test.

[20] Reverting back to our instant appeal, there was the evidence from the prosecution witness who had testified to the effect that the injury sustained by the deceased that was attributable to the appellant was sufficient in the course of nature to cause death. In this regard, we had adverted to the testimony of SP8, the pathologist, in particular, at pp 57–59 of the notes of proceedings in record of appeal, Vol 1. SP8 had testified as follows: 'Kecederaan-kecederaan yang dinyatakan itu cukup pada lazimnya menyebabkan kematian'. In this case, the deceased did not die immediately after being admitted into hospital. In fact, he died seven days later.

[21] Limb (c) under s 300 of our Penal Code is in pari materia with the third limb of the Indian Penal Code, from where in fact, the former can find its genesis. Also referred to as para 3 or cl 3 to s 300 of the Indian Penal Code, it has been observed by the authoritative authors of '*The Law of Crimes*' by Ratanlal and Dhirajlal, that in order to establish a case against the appellant, the prosecution had to prove that first, that the accused person had intentionally caused bodily injury or injuries onto the deceased's person; and secondly, that the injury so inflicted on the deceased was sufficient in the ordinary course of nature to cause death (refer to the case of *Faquira v State of Uttar Pradesh* AIR 1955 All 321). The same learned authors further made a further acute observation as follows:

> From the fact that the injury caused is sufficient in the course of nature to cause death, it does not conclusively follow that the offender intended to cause an injury of that nature. The one does not conclusively prove the other.

[22] They concluded, on the true interpretation of that cl 3 to s 300 of the Indian Penal Code, as follows:

> To attract the provisions of clause thirdly of Section 300, I.P.C. the prosecution should prove that the injuries on the person of the deceased were caused with an intention to inflict those injuries and none of the injuries was caused unintentionally. It should also be further proved that the injuries caused to the deceased were sufficient in the ordinary course of nature to cause his death (see, the case of *Shiv & Ors v State of Madya Pradesh* [1988] 3 Crimes 8).

[23] With respect, we would endorse such statement of the law, on the true import of the limb 3 to our s 300 Penal Code. It has given great clarity as to the required legal elements that the prosecution need to establish in order to secure a conviction for murder against the accused person.

[24] The evidence led in this case had shown the appellant was seen hitting the deceased person on his head many times at various places on the fateful day. The criminal law presumes that every man intends the consequences of his deliberate acts, unless he could show that those acts have been either accidental

or negligent, as those latter acts would negative intention on his part. Or that there was a material intervening act subsequent to his impugned act. In the absence of those circumstances, he must be deemed to have intended the consequences of his acts. In the context of the factual circumstances in this case, it was clear to us that the appellant had intended the injuries which were inflicted by him on the deceased's head which, objectively, is a critical part of a human person's anatomy. The evidence to this effect was led by SP7 and SP10 who were both friends of the appellant and of the deceased respectively, who had testified that only the appellant had hit the deceased on the left side of his head. They were not challenged on this crucial evidence when they were being cross-examined by learned counsel for the appellant. Neither was SP13, the investigating officer of this case, confronted with the proposition to the effect that somebody else, besides the appellant, had also beat up the deceased on his head.

[25] Then there was the evidence of the medical expert who testified that such an injury so caused was sufficient, in the ordinary course of nature to cause death to happen to the deceased. According to SP7 and SP10, the appellant had elbowed and kneed the deceased on the left side of his head. Dr Rajindra Rao a/l Ramalu ('SP2') had testified that he had to perform surgery on the deceased in order to remove a blood clot in his brain. Such beatings to the head had caused internal bleeding in the deceased's brain. The deceased never regained consciousness as a result of the bleeding in his brain. He died seven days later, as a direct result thereof and not because of any other cause. In fact, the appellant had averred that the deceased could have died of pneumonia, but before us, the learned counsel had indicated to us that he had instructions from the appellant to abandon that line of defence. We had occasion to advert to that part of the learned JC's grounds of judgment that dealt with that issue. We were of the view that in light of the significance of this issue, as it suggested that there could have been an intervening cause resulting in the death of the deceased, we found that it was incumbent on us to advert to learned JC's appreciation of that defence as it was raised in the High Court proceedings. The issue had been concerned with the interplay between the evidence of SP2 and SP8. SP2 was the doctor who performed the surgery on the brain of the deceased at Kuala Lumpur Hospital on 10 June 2013 in order to remove the clot in the brain. He also testified that the deceased suffered pneumonia but he maintained in his testimony in court that when the deceased died on 17 June 2013 the cause of death was due to 'severe traumatic brain injury', not on account of the pneumonia. That finding by SP2 was supported by SP8, the pathologist, who did the autopsy on the deceased's person. His autopsy revealed that the deceased had died because of the severe injury to the left side of his head caused by 'blunt trauma'. That injury had caused the deceased's brain tissue to swell (cerebral oedema). SP9 in his testimony told the court that the injury suffered by the deceased occurred when the brain was subject to a hit or 'hentakan dengan alat tidak tajam atau bahagian anggota badan'. He went on to state that

'Contoh anggota badan yang boleh menyebabkan kecederaan seperti tumbukan dengan tangan, kaki atau pun lutut'. That was consistent with the evidence of SP7 and SP10 as to how the appellant had inflicted hits on the deceased's head by using his elbow and knee. There was no injury to the chest or abdomen of the deceased. Having taken the evidence of SP2 and SP8 in their proper context, the learned JC concluded the way he did at p 164 of the record of appeal, Vol 2, like so:

> Dari keterangan ini mahkamah ini mendapati bahawa sekalipun terdapat jangkitan paru-paru (pneumonia) namun ia bukan punca sebenar kematian Simati memandangkan pneumonia itu sendiri berpunca dari kecederaan kepala yang dialami oleh Simati.

[26] The learned JC found no conflict between the evidence of SP2 and SP8. Both were consistent in their respective view that the cause of death of the deceased was the injury inflicted on the left side of his head that had caused *cerebral oedema* or what is essentially a general inflammation of the brain tissue, from which he had succumbed to on the 17 June 2013. The learned JC accepted the medical cause of death was 'severe traumatic head injury'. He did not find any medical evidence placed before him to warrant a finding of pneumonia as the cause of the deceased's death. Neither was there any other intervening cause that had attributed to the deceased's death but for the intended injury that was inflicted by the appellant.

[27] Upon perusal of the evidence as adduced, we found that there was therefore no intervening cause that could have caused the death of the deceased, although it was suggested by the defence that pneumonia had intervened to become the effective cause of death. Clearly, it was, on the medical expert evidence, wholly attributable to the beatings that he received from the appellant. In such a scenario, we were not surprised that this ground was rightly abandoned by learned counsel at the outset of the hearing of this appeal.

[28] In the factual context of this case, the injury inflicted on the head of the deceased by the appellant had caused internal bleeding in his brain and is one in the normal course of nature to cause death. Such injury in *most probability* will cause death. It is not an act that is *only likely* to cause death. The internal bleeding to the brain is a severe form of injury, where death is more imminent to occur than it is merely likely to result. That is the fine but real distinction between what constitutes murder and what constitutes culpable homicide, as to be recalled, can be traced to the judgment of Raja Azlan Shah FJ (as His Highness then was) in the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174. The evidence of SP9 who had performed the scan on the brain of the deceased at Temerloh Hospital and recommended that the deceased be sent to the Kuala Lumpur Hospital had expressed an opinion in

like so:

> Pada pendapat saya 'severe head injury' pada lazimnya boleh menyebabkan kematian.

[29] As earlier noted, SP8 the pathologist had come to the same conclusion on the nature of the injury suffered by the deceased inflicted by the appellant as follows:

> Kecederaan-kecederaan yang dinyatakan itu cukup pada lazimnya menyebabkan kematian. (See p 59 of record of appeal, Vol 1).

[30] Essentially, that would translate to mean that such intended severe head injury inflicted would be sufficient in the ordinary course of nature to cause death. This court in the case of *Public Prosecutor v Megat Shahrizat bin Megat Shahrur* [2013] 3 MLJ 227; [2011] 5 CLJ 608 had occasion to state the following:

> Under s 300(c) of the Code it is not enough to prove that the injury found to be present is sufficient in the ordinary course of nature to cause death. In addition, it must also be proved that the injury found to be present is the injury intended by the accused.

[31] So, the appellant's contention that he did not intend to cause the death of the deceased and that he only intended to cause injury to him could not hold water. It had been proven that the injury that he intentionally inflicted on the deceased was sufficient in the ordinary course of nature to cause death. What he did *post* that, by way of benevolent conduct, could not change that finding of guilt that has been concluded. At the highest, it may go towards mitigation, if at all. With respect, we were in agreement with the learned JC that in light of the evidence placed before him, a charge for murder as envisaged under limb (c) to s 300 of the Penal Code had been made out against the appellant.

[32] We would now proceed to deal with the last complaint raised by the appellant. That complaint was concerned with the alleged failure on the part of the learned JC to sufficiently appreciate the defence of the appellant. Invariably, in a litigation based on the adversarial system, even in a criminal trial, the defence case will necessarily be revealed at the earliest opportunity, when the relevant witnesses for the prosecution are being cross-examined and the case of the defence is put to them. In short, the prosecution witnesses are confronted with what essentially would be the foundation of the accused person's defence. The legal ramifications of this regime were succinctly explained by Mukharji J in the oft-quoted case of *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 having referred to the House of Lords decision in the case of *Browne v Dunn* (1893) 6 R 67. We would now reproduce that part of Justice Mukharji's decision pertaining to that issue, like so:

(10) The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

(11) On this point the most important and decisive authority is *Browne v Dunn, reported in* (1893) 6 R 67. It is a decision of the House of Lords where Lord Herschell, L C, Lord Halsbury, Lord Morris and Lord Bowen were all unanimous on this particular point. Lord Chancellor Herschell, at p 70 of the report observed: 'Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses'.

(12) Lord Halsbury, the other member of the House of Lords, at p 76 of the same report said: 'My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to'.

[33] The proper appreciation of the effect of an afterthought or belated defence was clearly explained by learned Justice Edgar Joseph Jr FCJ in the case

of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705, where the proper approach to be undertaken should be that although the defence was correctly found as an afterthought, the learned JC would still be obliged to consider the defence, however weak, and ought only to convict the accused person of the charge, if and only if, the prosecution has discharged its legal burden of proof, which is to establish its case beyond reasonable doubt against the accused person. In the words of Justice Edgar Joseph Jr, at p 707 like so:

> It is settled law that although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit, if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

[34] So, an afterthought defence is a defence that smacks of a recent invention on the part of an accused person. It is a defence that was never revealed during investigation, nor confronted to the relevant prosecution witnesses during their cross-examination in the prosecution stage. Such being its nature, it is quite incapable, or difficulty of belief. Indeed, it arouses suspicion as to its veracity. But, the fact that it is unbelievable does not relieve the prosecution of its attendant duty throughout the entire case, to prove its case beyond reasonable doubt. Neither does it automatically mean that the court must therefore convict the accused person, on account that the defence has been a mere afterthought. Rather, on authority of the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263 it is still incumbent on the court to consider the entire evidence before it to see whether the accused person has raised a reasonable doubt in the prosecution's case. If such a lingering, as opposed to a fleeting or whimsical, doubt is created in the mind of the court, then the accused person is entitled, as a matter of law, to be acquitted and discharged forthwith, from the charge levied against him.

[35] We noted that the learned JC had taken a similar approach. He had, in considering the appellant's defence, looked at how the appellant had managed his defence version during the prosecution case. Having done so, he had noticed that the material factual circumstance which the appellant had advocated during the course of his defence was never put to the relevant witnesses for the prosecution. We had adverted to that in the foregoing paragraphs of this judgment.

[36] In the circumstances, we found that it was not wrong for the learned JC to regard the appellant's defence as an afterthought defence. An overall perusal of the learned JC's treatment of the appellant's version of event, in the light of the entire evidence before him had shown to us that he had appreciated the defence version more than sufficiently. We noted that he had not considered

the defence version in isolation, or in a blinkered or myopic manner. By looking at the defence the way he did, namely in the context of the entire evidence before him, he was able to consider the probabilities of both parties' evidence as led before him. More important than that is the fact that he had done so correctly. By doing that, he had scrutinised the entire evidence before him and subjected them to an objective and critical assessment. We were satisfied that he had not committed any error of an appealable nature, in the course of his appreciation of the appellant's defence. We found no merit in the appellant's complaint that the learned JC had erred when he allegedly failed to sufficiently appreciate and consider the appellant's defence.

[37] As such, in the upshot, there was nothing for us to interfere by way of appellate intervention. The learned JC had correctly dealt with the issues raised and to have concluded that the appellant had not raised any reasonable doubt in the prosecution's case. The prosecution had proven its case beyond reasonable doubt. The law on the prosecution demands that its case against the accused person *must* be the truth, as it does not suffice that it *may* be true, in the circumstances. We were unanimous in that the prosecution had fulfilled that exacting yet fair threshold placed on its shoulders in this case. We therefore had dismissed this appeal. We found the conviction entered, and the ensuing mandatory death sentence imposed, against the appellant, as safe and justified in the circumstances. In the circumstances, with respect, we were in agreement with learned miss deputy public prosecutor that the charge against the appellant for the murder of one Mohamad Borhan bin Md Radzali @ Mohamad Rozali had been proven beyond reasonable doubt.

[38] On account of the above, we therefore had affirmed the conviction and sentence by learned JC under s 302 of the Penal Code.

[39] We had so ordered.

Appeal dismissed; conviction and sentence by learned JC affirmed.

Reported by Dzulqarnain Ab Fatar